

APR 08 2019



**UNITED STATES DEPARTMENT OF COMMERCE**  
**Office of the General Counsel**  
Washington, DC 20230

*Via FOIAOnline*

Ms. Emma Best  
MuckRock News  
Dept. MR 54991  
411A Highland Ave  
Somerville, MA 02144

Re: FOIA Appeal #DOC-OS-2018-001888 (Request #DOC-OS-2017-000329)

Dear Ms. Best:

This responds to your administrative appeal under the Freedom of Information Act (FOIA) (5 U.S.C. § 552) which was received by the Department on July 10, 2018. Your appeal challenges the administrative closure of Mr. Michael Best's request, DOC-OS-2017-000329, which sought "records from 2015 and 2016 relating to or mentioning Wilbur Ross, including communications received from or sent to Mr. Ross, as well as emails mentioning him."

Mr. Best was provided interim releases on April 21, 2017, September 6, 2017, and February 5, 2018, totaling 2490 pages. By letter, dated February 5, 2018 and sent via FOIAOnline, the Department's Office of Privacy and Open Government requested that Mr. Best confirm his continued interest in this request. In a letter dated March 28, 2018, after more than thirty days passed without a response, OPOG informed Mr. Best that it had administratively closed his request. That decision letter was sent to him via FOIAOnline on March 30, 2018.

On July 10, 2018, we received your appeal, dated June 25, 2018. Your appeal states that you are "appealing the closure of the request, as no letter or release dated February 5, 2018, was ever received. This is documented on <https://www.muckrock.com/foi/united-states-of-america-10/wilbur-ross-commerce-30904>".

To the extent that you question the provision of a "still interested" query, this office confirmed that an email was sent. On February 5, 2018, along with the third interim response, a letter was provided to Mr. Best, informing him that the Department was providing him with a third interim response of 2,122 pages. In its penultimate paragraph, the letter asks that he contact the Department and confirm his continued interest in the request, and that if the Department does not receive a response within the next thirty days, it would assume that Mr. Best was no longer interested in the information.

On March 30, 2018, the Department informed Mr. Best that since more than thirty days had passed with no confirmation, it was closing the request.

Although OPOG's administrative closure of your FOIA request was proper, it constituted an adverse determination on both the documents fully withheld as well as the documents that had been released to you with partial withholdings prior to the closure. *See* 15 C.F.R. § 4.7(c)(2)(i). The closure letter therefore stated

You have the right to appeal this denial or partial denial of your FOIA request. An appeal must be received within 90 calendar days of the date of this response letter.

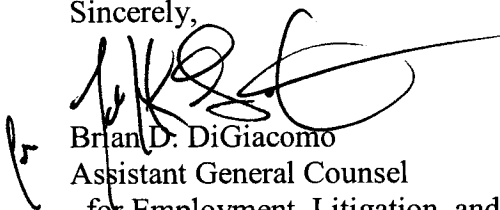
and provided information about how and where to submit appeals.

Pursuant to our regulations, an appeal may be submitted in writing or electronically, but "must be received by the Office of the General Counsel during normal business hours ... within 90 calendar days of the date of the written denial of the adverse determination..." 15 C.F.R. § 4.10(a)(1). According to our records, the written denial was sent via FOIAOnline on March 30, 2018. Your records at <https://www.muckrock.com/foi/united-states-of-america-10/wilbur-ross-commerce-30904/>, which your appeal referenced, appears to accord with that, indicating that the written denial was received via email on March 30, 2018. As such, your appeal was due June 28, 2018. According to our records, your appeal was received July 10, 2018, despite being dated June 25, 2018. (Your records available on the specified website do not provide evidence to the contrary - they indicate only that the letter was transmitted by mail, but do not indicate the actual date of mailing or the date of delivery of the letter.)

Here, it is the date the appeal was received by the Department that is important. According to our regulations, "[a]ppeals received after the 90-day limit will not be considered." We hold that your appeal is untimely and will not be considered. We recognize that you allege that, prior to receiving the adverse determination, you did not receive the February 5, 2018 warning that your request would be closed out if you did not respond. However, according to your records and your appeal, you *did* receive the adverse determination on March 30, 2018, and it is the adverse determination that triggers the 90-day limit to appeal, *not* the "still interested" letter that you allege you did not receive. Had you appealed in a timely fashion or simply asked the FOIA Officer to reopen your request, we could have helped you pursuant to our regulations. But as your appeal is untimely, per our published regulations and in accordance with administrative law, it will not be considered.

This is the final decision of the Department of Commerce. You have the right to obtain judicial review of this decision as provided for by 5 U.S.C. § 552(a)(4)(B).

Sincerely,

  
Brian D. DiGiacomo  
Assistant General Counsel  
for Employment, Litigation, and Information

Cc: Carrie Hyde-Michaels, Deputy Chief FOIA Officer